

# SAVE OUR SOUND

 alliance to protect nantucket sound

August 17, 2006

Doug Slitor,  
Project Coordinator, LIOWP  
Minerals Management Service  
MS 5412, 1201  
Elmwood Park Blvd.,  
New Orleans, LA 70123

RE: Comments on the EIS for Long Island Offshore Wind Park (LIOWP) project.

Dear Mr. Slitor:

I am writing on behalf of the Alliance to Protect Nantucket Sound (APNS) to comment on the Long Island Offshore Wind Park (LIOWP) application. APNS is a nonprofit coalition of concerned citizens, businesses, towns and local government and civic groups that originally formed in response to a similar application, originally submitted by Cape Wind Associates in 2001. Since that time, APNS has become intimately acquainted with the problems with, and potential benefits of, offshore wind energy development. It is within this context that we respectfully submit the following comments for your review.

On June 19, 2006 the Minerals Management Service (MMS) published a notice of intent (NOI) and request for comments on the scope of the Draft Environmental Impact Statement (DEIS) for the LIOWP. 71 Fed. Reg. 35293- 35294 (June 19, 2006). According to the NOI, LIOWP will consist of 40 individual wind turbine power generators in the Atlantic Ocean, 3.6 miles off Long Island, New York. The towers will be spaced over an 8-square-mile area of the Outer Continental Shelf (OCS).

APNS strongly supports the development of appropriately sited renewable energy, and we believe that the uniform application of a well-structured national regulatory program with an ecosystem-based regional approach for site selection will facilitate the development of much needed renewable energy sources, while at the same time ensuring that the marine environment is protected. We strongly believe that progress in renewable energy development has been unnecessarily obstructed by projects attempting to pre-empt the national regulatory program currently being established. As such, APNS must object to the current review of the LIOWP project, which is premature at this time. MMS is conducting the review before review standards and national regulations are in place; and prior to the completion of important scientific studies to the detriment of the national regulatory program and of the project review.

Pursuant to the Energy Policy Act of 2005, programmatic regulations for the development of alternative energy are being developed. Those regulations are subject to a programmatic EIS, which is also under development. All alternative energy projects on the on the Outer

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Continental Shelf (OCS), including LIOWP are to be subject to these regulations once they have been established. The programmatic regulations are to include standards for project siting and review and are to be based on what is best for the entire OCS resource. In addition to these regulations, a series of congressionally mandated studies directly relevant to wind energy development have yet to be completed. These include a study by the National Academy of Sciences (NAS) regarding the environmental impacts of wind energy; a NAS assessment of all of the alternative energy resources of the OCS; and, a Department of Defense study on the impacts of wind energy on military readiness.

MMS must wait for the completion of the programmatic regulations and relevant scientific studies before proceeding with any individual project assessment. If it does not wait, MMS will impede the success of national regulatory program and will undermine the validity of the project level review. The impact of the regulations can only be optimized if the regulations are applied uniformly to all projects. The importance of having all projects be equally subject to the regulations becomes particularly clear in the context of cumulative impacts. Cumulative impacts are those impacts which at an individual project level may seem insignificant but which can be a significant problem when viewed in conjunction with other projects. One of the primary mechanisms for addressing cumulative impacts is the resource-wide coordination of project sites. This important mechanism will be impeded if projects move forward before the Programmatic Regulations can establish optimal siting standards and guidelines for all of the OCS. It is especially important for the LIOWP and Cape Wind projects, as both are in essentially the same region and will clearly have cumulative effects that must be considered together.

In addition, a premature project assessment undermines the legality of the project review itself. It creates an obstacle to public participation in decision making. The public cannot fully participate in ensuring that the project review meets relevant national standards if public comments are required to be submitted prior to the establishment of those national standards. Furthermore, because there is no way for MMS to know what the national standards will require, its review will be at best incomplete and inadequate. MMS's criteria for the project review may also be viewed as arbitrary in the absence of congressionally mandated national guidelines.

It is important to note, that to the extent that MMS is relying on section 388 of the Energy Policy Act of 2005 as a basis for premature review, it is mistaken in doing so. As APNS noted in its comments regarding the scope of the Cape Wind DEIS, nothing in section 388 or any other section of the Energy Policy Act of 2005 indicates that Congress intended MMS to begin review of individual projects prior to developing a regulatory program. There are two special interest provisions which benefit Cape Wind and LIOWP in section 388. The first provision, referred to as the "savings provision," exempts these projects from resubmitting any documents that were previously submitted or having to seek reauthorization of any action that was previously authorized. *See* Pub. L. No. 109-58 § 388 (d). The second provision exempts Cape Wind and LIOWP from a mandatory competitive process for the

grant of a lease or easement. *See id.* § 388 (a)(3).<sup>1</sup> Neither provision indicates that Congress intended to allow review of these projects before rules are promulgated. Indeed, explicit exemptions from certain requirements applicable to all other projects strongly suggests that, where no explicit exemption is referenced, Congress did not intend for one to be provided. When Congress intended an exemption for a specific project, it explicitly provided one. The absence of an exemption for such an obvious issue indicates that Congress planned for all project review to follow development of the regulatory regime mandated.

This premature review is contrary to sound environmental policy, administrative expedience, and congressional intent. MMS should not attempt to review the LIOWP project until national review standards and regulations are in place; and necessary scientific studies are complete.

When MMS does decide to proceed with the LIOWP review, it must be sure to focus on the crafting of an appropriate purpose and need statement to guide the project review.

The purpose and need statement is a critical component of an EIS. How the purpose and need statement is drafted is crucial inasmuch as the purpose and need statement shapes the scope of the entire review. “The stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives....” *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1995) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C. Cir. 1991)).

The Notice of Intent (NOI) published by MMS on June 19, 2006, states that the “purpose of [the LIOWP] project is to provide a utility-scale wind energy facility providing power to the New York power grid.” If this is the statement MMS intends to use for its DEIS, the statement is inadequate. To the extent that “utility scale” is defined to exclude projects smaller than the proposed project, it is an inappropriately restrictive term. The limitation of facilities designed to deliver electricity solely to “the New York grid” also does not reasonably reflect the purpose of the project and impermissibly restricts the range of alternatives to be considered. A broader purpose and need statement is required.

Courts do not permit agencies to define the purpose and need statement to minimize review obligations. An agency may not “define [a] project so narrowly that it foreclose[s] a reasonable consideration of alternatives.” *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002). Nor can NEPA review be limited by arguing that an alternative is not acceptable because it is not desirable, or even feasible, for the applicant itself. *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Many courts have concluded that an agency’s “evaluation

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<sup>1</sup> This provision does not prohibit the Secretary from electing to require a competitive process for either project.

of alternatives mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.” *Id.* The starting point for defining the purpose and need statement is the agency mandate under the particular statute involved: “[A]n agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as other congressional directives.... Once an agency has considered the relevant factors, it must define goals for its action that falls somewhere within the range of reasonable choices.” *Citizens Against Burlington*, 938 F.2d at 196. *See also City of New York v. Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) (explaining that “[s]tatutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives”).

Keeping in mind these legal requirements, the purpose of the proposed project is not to generate clean energy of a specific size in one specific location. If MMS defines “utility scale” to exclude small scale alternative energy projects, then by limiting the purpose and need statement to “utility scale” projects connected to the “New York grid,” MMS is violating NEPA and defining the project in a way that impermissibly rules out alternatives. MMS should shape the purpose and need statement broadly with the idea of decreasing dependence on polluting energy sources.

Furthermore, MMS should consider that one of the key justifications for offshore wind energy projects is their lack of air emissions. Because air quality in the Northeast is directly affected by activities in the Midwest MMS should shape the purpose and need statement to include assessments of project alternatives in a broader.

As discussed in APNS’s comments on Cape Wind submitted to MMS July 28, 2006, MMS should look to the Regional Greenhouse Gas Initiative (RGGI) to define the area under review. The RGGI is a cooperative effort by Northeastern and Mid-Atlantic states impacted by poor air quality to reduce carbon dioxide emissions. The RGGI recognizes the significance of emissions generated beyond the boundaries of the impacted states. MMS should follow a similar approach and look regionally when assessing project alternatives. This can only happen if the purpose and need statement is written broadly enough to consider all significant and viable alternatives.

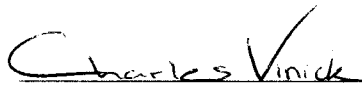
The following purpose and need statement would be appropriate for the LIOWP project DEIS:

*The purpose of the proposed project is to develop a clean energy facility to supply power to states within the area covered by the Regional Greenhouse Gas Initiative.*

As outlined above, the purpose and need statement of the DEIS is the keystone to a solid project review. MMS must ensure that the statement is broad enough to include assessments of small scale renewable energy projects from a wide region as alternatives to the proposed project.

APNS appreciates having this opportunity to comment on the LIOWP proposal. Applications for offshore wind energy development raise very significant and complex issues that have yet to be resolved. The LIOWP proposal needs to be considered in this context and in connection with the proposed Cape Wind project. Please feel free to contact me at (508) 775-9767 should you have any concerns regarding this issue.

Very truly yours,

  
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